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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 111.

WILLIAM M. FERGUSON, Attorney General of the State of Kansas, and KEITH SANBORN, County Attorney of Sedgwick County, Kansas,
Appellants,

vs.

FRANK C. SKRUPA, Doing Business As Credit Advisors,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

BRIEF OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS.

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Appellants,

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BRIEF OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS.

NATURE OF CASE.

This is an appeal from the judgment and orders of a three-judge court sitting in the District of Kansas (Huxman, Circuit Judge, Retired, and Hill and Stanley, District Judges), rendered November 27, 1961 (210 F. Supp. 200). Said judgment declared the Kansas Debt Adjust-

ment Law (Session Laws of 1961, Ch. 190, Appendix A), to be in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, and enjoined the County Attorney of Sedgwick County, Kansas, and the Attorney General of Kansas from enforcing this law.

JURISDICTION.

The three-judge court which tried the case was duly convened in accordance with U.S.C., Title 28, Secs. 2281 and 2284 (R. 43). The present appeal is taken under U.S.C., Title 28, Sec. 1253.

STATUTES INVOLVED.

The Kansas Debt Adjustment Act, Session Laws of 1961, Ch. 190 (sometimes referred to as Senate Bill 366, 1961 Session), is shown at Appendix A. It is also now printed as G.S., 1961 Supp., Sec. 21-2464.

STATEMENT.

Frank C. Skrupa, a resident of Nebraska, commenced this action June 27, 1961 (R. 1), in the United States District Court for the District of Kansas, to enjoin Keith Sanborn, the County Attorney of Sedgwick County, Kansas, and William M. Ferguson, Attorney General of the State of Kansas, from enforcing the Kansas Debt Adjustment Act. Plaintiff contended that said act is invalid in that by its terms and enforcement he would be deprived of his property and rights, he would be denied equal protection of the laws, and that the obligations of his contracts would thereby be impaired. He also contended that

said act violated Article II, Section 16 of the Kansas Constitution, in that the subject of said act is not clearly expressed in the title of the act. By his second cause of action, plaintiff alleged existence of an actual controversy between the parties with regard to said act and asked for a declaratory judgment that said act was invalid and that defendants have no right to enforce the same (R. 6).

On June 28, 1961, a hearing was held before Hon. Delmas C. Hill on plaintiff's application for a temporary restraining order. At this hearing evidence was introduced (R. 7) and the temporary injunction was granted (R. 41). Trial on the merits took place August 17, 1961 (R. 57), before a three-judge court, consisting of Hon. Walter A. Huxman, Circuit Judge, retired, and Hon. Delmas C. Hill, Circuit Judge, and Hon. Arthur J. Stanley, District Judge. A transcript of the evidence received at the hearing on June 28, 1961, of plaintiff's application for a temporary injunction was made part of the record in the trial on the merits (R. 63, 64).

The evidence in the case shows that under the name of Credit Advisors the appellee Skrupa has, since the spring of 1960, conducted a business at Wichita, Kansas, which he admits comes within the definition of "debt adjusting" as defined in L. 1961, Ch. 190, Sec. 1 (R. 10, 75). That neither Skrupa nor any of his employees is an attorney (R. 13), and that they do not give legal advice (R. 13, 82). That the service rendered is budget planning and financial management for persons burdened with indebtedness. That he advertises his business in the local newspapers (R. 23) and has spent considerable sums in establishing and promoting his business. That in return for his services the client agrees to pay Credit Advisors a fee (Ex. E, 20, 121) the amount of which depends on the total amount of the indebtedness of the client and the estimated

amount of work involved. That such fees usually run anywhere from 5% to 9% of the client's total debts (R. 16).

When a client enlists the help of Credit Advisors, he is first required to submit a list of all his indebtedness, and to state his income and total resources (R. 13, Ex. D. R. 20, 119). Credit Advisors then works out a plan whereby the client agrees to pay to it periodic payments according to his ability to pay. Credit Advisors then endeavors to persuade the clients' creditors to co-operate with the plan (R. 16) and to accept partial payments on their claims, as the client makes his payments to Credit Advisors and as it distributes such payments to the creditors. If a creditor refuses to co-operate, he is ignored in the distribution of payments by Credit Advisors, and the client is told to make his own arrangements with such creditor (R. 95). Appellee Skrupa testified that Credit Advisors does not advise clients as to their legal rights or their liability for any indebtedness, nor as to any steps such clients should take to protect their rights (R. 13).

That said county attorney has threatened to enforce said statute against Skrupa's business (R. 11) and that because thereof business has been frightened away from Credit Advisors, and that if defendants are not enjoined from enforcing said statute, Skrupa will be compelled to close his business and will be unable to perform his outstanding contracts (R. 11, 12).

The case was argued and briefs were submitted by the parties. Thereafter, on November 27, 1961, the court rendered judgment (R. 126, 128, 133) [Judge Stanley dissenting (R. 131)], holding that the Kansas debt adjustment act violates appellee's rights guaranteed to him by the due process clause of the Fourteenth Amendment to

the Federal Constitution, and enjoining defendants and all persons acting in their behalf from filing any complaints against appellee and his agents for alleged violations of said statute, or in any way attempting to enforce said statute against them.

QUESTIONS PRESENTED.

1. Whether L. 1961, Ch. 190, is a legitimate exercise of the police power of the State of Kansas.

2. Whether said statute is invalid because of a defect in the title of said act.

SUMMARY OF ARGUMENT.

I. The Kansas Debt Adjustment Statute Is a Valid Exercise of the State's Police Power.

1. Duly enacted statutes are presumed to be valid, and the burden is upon the person asserting invalidity to clearly show that the statute invades his constitutional rights. Of two possible interpretations, that one which will sustain the statute must be adopted.

2. The police power of the state may be exercised not only to protect not only the public health, morals and safety, but also the well being and tranquility of the people. The police power therefore extends to the prevention of deception, fraud and imposition.

In exercising its police powers the legislature has broad discretion, but its enactments must not be so arbitrary and unreasonable as to violate the due process and equal protection provisions of the 14th Amendment.

If the evil at which the statute is aimed has a reasonable relation to the public welfare, and if the remedy

which the statute prescribes reasonably adapted to accomplish the end sought, the statute is not arbitrary or unreasonable.

3. The legislature had grounds for believing that the business of debt adjustment was inimical to the public welfare.

(a) The existence of such evil must be assumed if, within reason, any state of facts can be conceived which would support the statute. However, because of the great increase of installment buying in recent years, many persons have obligated themselves beyond their ability to pay, and in consequence are in distress financially. Lacking ability to solve their own problems, they eagerly accept the debt adjuster's promises of relief from debt worries.

(b) Fifteen other states had already legislated against debt adjustment.

(c) The Supreme Judicial Court of Massachusetts had held the statute of that state valid (*Home Budget Service* v. *Boston Bar Assn.*, 139 N.E.2d 387). That opinion describes the methods employed by the debt adjuster in substantially the same manner as is shown by the evidence in this case.

On the other hand the Pennsylvania law which is practically the same as the Kansas statute was held unconstitutional in that state (*Comm.* v. *Stone*, 191 Super. 117, 155 Atl. 453). For the reasons set out in the brief, that case is not controlling. By adopting the Pennsylvania statute, the Kansas court did not adopt the construction placed on the Pennsylvania statute by the superior court of that state.

(d) Numerous articles critical of debt adjusting had been published in legal journals, nationally circulated magazines, newspapers and other published material.

(e) Notwithstanding their broad representations, Credit Advisors does not supply the services they promise to give either to debtors or to creditors.

(f) In serving their clients, debt adjusters engage in the unauthorized practice of law.

4. In view of all the circumstances the Kansas legislature had sufficient ground to consider debt adjusting an evil which needed to be curbed.

5. The remedy provided by the Kansas statute was reasonably adapted to protect the public against the evils of debt adjusting. The Kansas statute is regulatory, rather than prohibitory. It does not prohibit debt adjusting where that service is rendered gratuitously, and it expressly permits debt adjusting when performed by an attorney incidentally in the practice of his profession. Debt adjusting inevitably involves legal problems and only trained lawyers can give debtors the help they need.

II. The Title of the Kansas Act Complies with Constitutional Requirements.

The title is broad, relating to the business of debt adjusting, making certain acts unlawful and prescribing penalties. All of the text of the statute is comprehended by these broad terms and complies with Art. 2, Sec. 16 of the Kansas Constitution.

ARGUMENT.

I. The Statute in Question Is a Valid Exercise of the State's Police Power.

Consideration of the constitutionality of a duly enacted statute must begin with the presumption of its validity (*Alaska Packers* v. *Industrial Accident Commission*, 294 U.S. 532, 543, 79 L. Ed. 1044, 1049; *Mo. Pac.* v. *Norwood*, 283 U.S. 249, 254, 75 L. Ed. 1010, 1016). While this presumption is rebuttable, every possible presumption is in favor of validity until overcome by a rational doubt (*Adkins* v. *Children's Hospital*, 261 U.S. 525, 544, 67 L. Ed. 785, 790, 43 S. Ct. 394, 24 A.L.R. 1238). The burden therefore rests upon the appellee Skrupa to establish with convincing clarity that the statute infringes upon his constitutional rights (*Corporation Commission* v. *Lowe*, 281 U.S. 431, 438, 74 L.Ed. 945, 949; *Toombs* v. *Bank*, 281 U.S. 643, 647, 74 L. Ed. 1088, 1090). Absent such showing, the presumption of constitutionality must prevail (*O'Gorman & Young* v. *Insurance Co.*, 282 U.S. 251, 75 L. Ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163). And as between two possible interpretations, by one of which it would be unconstitutional and the other valid, it is the court's duty to adopt that which will save the act (*N.L.R.B.* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1, 30, 81 L. Ed. 893, 908, 57 S. Ct. 615, 108 A.L.R. 1352).

The statute in question was enacted under the police power of the state. That power extends beyond protection of the public health, morals and safety and includes within constitutional limitations, power to protect the well being and tranquility of the public (*Kovacs* v. *Cooper*, 336 U.S. 77, 83, 93 L. Ed. 513, 520). This authority of the state to

enact laws reasonably deemed necessary to promote the health, safety and general welfare of the people carries with it a wide range of discretion as to what matters are of sufficiently general importance to be subjected to state regulation (*Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 238, 61 L. Ed. 685, 696, 37 S. Ct. 260). The prevention of deception, fraud and imposition is therefore a field in which the police power may be exercised (*Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 551, 61 L. Ed. 480, 489).

But whatever the legislature may have done in enacting laws to promote and protect the public welfare, such legislation must be within constitutional limits. The courts are not concerned with the wisdom of such legislation (*Williamson* v. *Lee Optical*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461), but they are concerned with the question whether such statutes are arbitrary and unreasonable to the extent that they contravene the due process and equal protection clauses of the 14th Amendment to the Federal Constitution. That the statute in question violates these constitutional provisions, was the holding of the court below:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because

> the reasonableness of each regulation depends upon the relevant facts."
>
> (*Nebbia* v. *New York*, 291 U.S. 502, 525, 78 L. Ed. 940, 950, 89 A.L.R. 1469, 1476.)

Hence, in determining whether a statute ostensibly enacted under the police power violates the constitutional limitations, the rule of reason must be applied to the facts of a particular situation (*Chicago Mercantile Exchange* v. *Tieken*, 178 F. Supp. 779, 785).

At the trial of this case appellee contended that the Kansas statute was unreasonable and violated his rights granted by the 14th Amendment; and the lower court so held. That is the question now before this Court, and its answer depends on two factors: whether the evil sought to be remedied bears a reasonable relation to the public welfare; and, whether the remedy provided is reasonably adapted to accomplish the end sought.

As to the existence of an evil justifying action by the legislature, if any state of facts reasonably can be conceived that would sustain the statute, the existence of that state of facts at the time the law was enacted must be assumed (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 79, 55 L. Ed. 369, 377; *Morey* v. *Doud*, 354 U.S. 457, 1 L. Ed. 2d 1485, 1491, 77 S. Ct. 1344). As shown by the history of the past fifteen years, the situation here needs not rest upon a mere assumption. During the period of abundant employment, increased wages and higher standards of living, plus the freedom with which credit has been extended to persons of moderate means, installment buying has increased many fold. In consequence many wage earners, and others as well, have contracted obligations in excess of their ability to pay. Burdened by their debts and pursued by their creditors, many debtors feel

themselves hopelessly involved. It is to these persons that the business of the debt adjuster or budget planner has a special appeal.

Aiding those in financial distress is a praiseworthy objective, but the evil at which the statute in question was directed is not the fact of assistance, but the methods pursued by the debt adjusters and the results which have followed their efforts. That the debt adjusting business does not function in such manner as to merit unqualified approval is apparent from the fact that between 1947 and the passage of the Kansas statute in 1961, no less than fifteen states enacted laws restricting the business of debt adjusting in some manner. A list of such statutes is shown at Appendix B. It is not without significance that so many of our states have felt the need for some such legislation.

The Kansas act follows the Pennsylvania statute closely, except in the name applied to the business, which is called "Budget planning" in the Pennsylvania law. However, in 1959, the Pennsylvania statute was declared unconstitutional in *Commonwealth* v. *Stone*, 191 Super. 117. 155 Atl. 453. The majority opinion of the court below relies strongly upon the Stone case, even stating, "we are in full accord with the reasoning and philosophy of the Pennsylvania court." (R. 129).

The *Stone* case is not entitled to the weight given it in the majority opinion in the present case. In the first place it is not the decision of the court of last resort in Pennsylvania. The fact is that it is the decision of the Superior Court, which is a court of intermediate appeals, from whose decisions on constitutional questions an appeal may be taken to the Supreme Court of that state (See Purdon, Penna. Statutes Annotated, Title 17, *Courts* Secs. 111, 190).

Furthermore, *Commonwealth* v. *Stone* was a criminal case in which stricter construction of the statute was required than is necessary in the present civil case. That case was an appeal from the order of the Quarter Sessions Court quashing the indictment, and the Superior Court had no evidence before it disclosing the nature and methods of the business of "budget planning." Hence, there was no evidential basis for the declaration of the Superior Court that budget planning was a legitimate business.

Furthermore, the opinion in *Stone* relies on *Adams* v. *Tanner*, 244 U.S. 590, 37 S. Ct. 662, 61 L. Ed. 1336, which involved a Washington statute forbidding employment agents to demand or receive a fee from a person seeking employment. It was held that this law was invalid in that it infringed upon the constitutional right of a citizen to engage in a useful and lawful business. This may have been considered good law in 1917 when that case was decided, but the trend of judicial opinion since then has been to the contrary. The dissenting opinion of Judge Stanley in the court below (R. 133), refers to the comment of Judge Augustus N. Hand in *Staten Island Loaders, Inc.*, v. *Waterfront Commission*, 117 F. Supp. 308, 311, pointing out this change of judicial thinking; but as early as 1931 Judge Hand had sounded a warning note in *National Employment Exchange* v. *Geraghty*, 60 F.2d 918, 921, as follows:

> "The powerful dissents in *Adams* v. *Tanner*, *Tyson* v. *Blanton* and *Ribnik* v. *McBride*, and the narrow margin by which the views of the majority prevailed, warn us that the doctrines of those cases are not likely to extend beyond the precise facts presented."

The accuracy of Judge Hand's prediction is evident by the statement of this court in *Lincoln Federal Labor*

Union, A.F.L., v. Northwestern Iron and Metal Co., 335 U.S. 525, 93 L. Ed. 212, 220, 6 A.L.R. 2d 473:

> "The Allgeyer-Lochner-Adair Coppage constitutional doctrine was for some years followed by this court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities. (Citation) and the same constitutional philosophy was faithfully adhered to in *Adams* v. *Tanner*, 244 U.S. 590, 61 L. Ed. 1336, 37 S. Ct. 662, L.R.A. 1917 F, 1163, Ann. Cas. 1917 D, 973, a case strongly pressed upon us by Appellants. In *Adams* v. *Tanner*, this court with four justices dissenting struck down a state law absolutely prohibiting maintenance of private employment agencies. The majority found that such businesses were highly beneficial to the public and upon this conclusion held that the state was without power to proscribe them. Our holding and opinion in *Olsen* v. *Nebraska*, 313 U.S. 236, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A.L.R. 1500, supra, clearly undermined *Adams* v. *Tanner*."

The changed constitutional climate is further evidenced by what this Court said in *Williamson* v. *Lee Optical*, 348 U.S. 483, 488, 99 L. Ed. 563, 572:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws regulatory of business and industrial conditions because they may be unwise, improvident or out of harmony with a particular school of thought."

Adams v. *Tanner* does not present a very substantial basis for either *Comm.* v. *Stone* or for the conclusion reached by the trial court in the present case.

Even though the decision in *Comm.* v. *Stone* preceded enactment of the Kansas statute, the Kansas legislature did not, by using the language of the Pennsylvania statute,

adopt the conclusion of the Pennsylvania Court with reference to the Pennsylvania statute. The rule of adoption of the construction placed on a statute by the courts of the state of origin is not an absolute rule to be followed under all circumstances (*Whitney* v. *Fox*, 166 U.S. 637, 647, 41 L. Ed. 1145, 1149). Its application depends on a presumption of legislative intent varying in strength with the similarity of the language and the character of the decisions in the state of origin (*Carolene Products Co.* v. *U.S.*, 323 U.S. 18, 26, 89 L. Ed. 15, 21, 155 A.L.R. 1371, 1380). In *State* v. *Campbell*, 73 Kan. 688, 703, 85 Pac. 784, it was said that there are exceptions to the general rule of adoption, and that it is not an absolute rule that where the courts of several states have construed substantially the same statutes differently, and the construction placed upon it by the state from which it was adopted is opposed to the weight of reason and authority, or against the general policy of our laws, such construction will not be followed.

As a matter of fact, the rule of adoption is a rule of construction to be used only where the meaning of the statutory language is uncertain, and is not applicable where the question is whether the statute is valid or not (*Reno* v. *Second Judicial District*, 59 Nev. 416, 95 P.2d 994, 125 A.L.R. 948; *Boyd* v. *Lumber Co.*, 119 Va. 348, 89 S.E. 273, 275, L.R.A. 1917A, 94, 96; *Re McKennan*, 25 S.D. 361, 127 N.W. 611, 33 L.R.A. (N.S.) 606, 618.

Returning to the subject of the existence of an evil which needed legislative intervention from 1955 on, there were abundant articles in various periodicals dealing with debt adjusting. Some of these were in professional publications such as the Personal Finance Law Quarterly Report, four articles; the Unauthorized Practice News, a publication of the American Bar Association, four articles; and The Legal Aid Brief Case, which is the publication of the

Legal Aid Association. Other similar articles appeared in popular magazines such as the Readers Digest and Good Housekeeping. Some publicity was also given to a "Statement on Debt Adjustment Business" by the Executive Council of the AFL-CIO, under date of February 21, 1961. And in September of that year an article on the subject was published in the AFL-CIO Federationist. A list of these various publications is shown at Appendix C.

Another source of information open to the Kansas legislature was the decision of the Supreme Judicial Court of Massachusetts in 1957, in *Home Budgeting Services* v. *Boston Bar Assn.*, 139 N.E.2d 387. That opinion states in considerable detail the methods used in the business of debt adjustment, there referred to as "debt pooling" (p. 389). As described in the above opinion, the methods of debt adjusters in Massachusetts were remarkably similar to those used by Credit Advisors as shown by the testimony of Mr. Skrupa.

The concern of the legislature with respect to the business of debt adjusting seems justified by the testimony of the appellee Skrupa, and the methods he uses to promote and conduct the operations of Credit Advisors.

Debt adjusters solicit business by advertisements designed to appeal to harassed debtors unversed in business matters and who lack the fortitude, ability and willingness to solve their own financial problems. One such advertisement (R. 23) begins with "Bills Pressing?" and suggests that by the intervention of Credit Advisors, all the debtor's indebtedness can be consolidated and arranged and paid by one low payment which the debtor can afford to pay. Emphasis is also laid upon the fact that no security and no co-signers are necessary to accomplish this result.

But solicitation by means of newspaper advertisement is not the only method debt adjusters use to attract clients. Defendant's Exhibit "C" (R. 20, 117) is a form of a letter which Credit Advisors send out to prospective clients.[1] The language in this letter is even less restrained than in the newspaper advertisements. Credit Advisors' method is said to be "a new and successful plan of consolidating debts, havng all the advantages of a consolidation loan without high interest, co-signers or the mortgaging of property; and making its office the one place to pay." The method is to budget the debtors' income and then Credit Advisors is to arrange a payment plan with the debtors' creditors by which retirement of the indebtedness will be accomplished through "a payment you can afford" and which Credit Advisors will distribute to the creditors "in such a way as to keep them satisfied."

This letter also points out the benefits to the debtor "if we receive regular payments from you." One benefit is promised which would have a strong appeal to many debtors in that the importunities of creditors will be diverted from the debtor to the debt adjuster. However, the benefit said to be most important is "you have peace of mind."

The first step in Credit Advisors program is that the debtor must furnish a list of all his creditors and the amounts due them on the form shown at Exhibit D (R. 20, 119). The purpose of this list is said in Exhibit C (R.

1. The index to the Transcript of Record describes Exhibit C as a "form of business letter to creditor explaining type of service." The language of Exhibit C—"You do not pay high rates of interest, nor do you need to mortgage property or have co-signers", etc.—shows clearly that it is a letter to a debtor who has requested information.

20, 117), to be to enable Credit Advisors to contact the creditors and to inform them that they will receive all payments from it, and that they are to contact the debt adjuster in the future. However, the list also serves as a basis for fixing Credit Advisors fee which is from 5% to 9% of the total indebtedness (R. 16), taking into consideration the estimated work involved (R. 98).

Apparently the debt adjuster makes no effort to verify the debtor's list of creditors or the amounts due them either by investigation of the public records or by inquiry elsewhere. "If a man comes to us and says he owes Jones $500, we assume he owes Jones $500." (R. 14, 30). In the regular course of business, examination of the public records is at least a necessity required by law and by prudence, and failure to exercise this reasonable caution is negligent conduct which the law penalizes. If the debt adjuster relies solely on the debtor's list of creditors, he falls short of rendering the client his best efforts.

Having listed his debts, the client then signs the document shown at Exhibit E (R. 20, 121). This instrument is styled "Agreement," but while it binds the debtor to everything, it does not obligate the debt adjuster to anything and is not even signed by the adjuster. In terms it appears to be an appointment of Credit Advisors as agent of the debtor "in arranging and making monthly payments to my creditors who are listed in my application." (R. 20, 121). As the result of this appointment a relationship of trust and confidence existed between the adjuster and the debtor But notwithstanding this fiduciary relationship, it is the creditor in whose favor the adjuster resolves every question; it is the creditor to whom the adjuster extends "a helping hand" (Exhibit A, R. 20, 115), and it is the creditor whose collection department is spared the task of making

the collection. In effect, the adjuster acts in the capacity of a bill collector, except that it is the debtor who pays the fee. In reality, it is the creditor who is the beneficiary of the adjuster's services. "No man can serve two masters."

In this instrument the debtor agrees to co-operate with Credit Advisors in the payment of these obligations. Next the debtor binds himself to furnish a list of his creditors, but it would seem that such list has preceded the "Agreement" in that the debt adjuster's total fee is stipulated in the third paragraph thereof and as has been stated above, the amount of the fee is fixed at some per cent of the total indebtedness (R. 16, 98).

The debtor also agrees to pay to Credit Advisors a stipulated sum per week or month until his present indebtedness, including the charges of Credit Advisors, is paid, but nothing is said as to how or when such fee is to be paid. The debtor also agrees that if he defaults in his payments, Credit Advisors may declare the contract terminated, and if so, the debtor promises to pay it the amount of $25.

The contract having been signed, Credit Advisors contacts the creditors listed and endeavors to persuade them to co-operate with the plan. In these negotiations, no attempt is made to reduce the amount claimed by the creditor. In the case of fixed payments, "we just assume that that is the amount the payment is going to be" (R. 16). "We negotiate to the extent that we say 'You will receive so much a month until the debt is paid in as long as this man is paying us regularly', according to the terms of our contract." (R. 14, 15). However, occasionally an effort is made to reduce the amount of the periodic payments due the creditor.

But what about the creditor who refuses to co-operate with the plan? Mr. Skrupa testified, "If they don't, why there is nothing we can do." (R. 16). "We merely tell the debtor to make some arrangements on his own, to go over there and try to straighten it out." (R. 95). We submit that this is cold comfort for the debtor who has looked to the debt adjuster for relief from worry over debt. So far as this particular indebtedness is concerned, the debtor has gained nothing by his relationship with the debt adjuster except that his indebtedness has been increased by the amount of the fee he has promised to pay.

The debtor having made a payment into the debt adjuster's hands, the latter owes a duty to both the debtor and the creditors to disburse the payment in accordance with the plan. As to the creditors, Credit Advisors sends to each of them the letter shown at defendant's Exhibit A (R. 20, 115). By its terms the creditor is advised that all the debtor's income over and above reasonable needs for living expenses, "is directed to us to pay his creditors." The letter describes Credit Advisors' position by saying "We function merely as a helping hand," and points out that their service "relieves some of the burden from your own collection departments." Creditors also receive from the debtor the letter shown at defendant's Exhibit B (R. 20, 116). This letter appeals for co-operation by the creditor with Credit Advisor's plan and states, "This will enable all of our creditors to receive their share of our income monthly until such time as our indebtedness may be refinanced or liquidated."

As heretofore stated, while the "Agreement," (Exhibit E, R. 20, 121) specifies the total compensation Credit Adjusters is to receive, nowhere is the time or manner of payment stated. The evidence shows, however, that Credit Advisors deducts varying amounts from each payment

made by the debtor as a credit on its fee. The record shows what was done in this respect in four cases handled by Credit Advisors.

In the Nickerson case (R. 102, 103) the total indebtedness was $1,972.00 and the fee was set at $165.00. The debtor made but one payment, amounting to $70.00. Out of this payment Credit Advisors deducted 11.4% or $7.98 for credit on its fee and paid the balance $62.02 to Commercial Credit Corporation. It seems likely that there were other creditors who received nothing, but the record does not show the names of the creditors. Three weeks later the debtor went into bankruptcy.

In the Phillips case (R. 104), the total indebtedness was $3,153.00, and the fee was fixed at $275.00. Phillips made payments of: $50, of which $7 or 14% was credited to the fee; $15, of which $2, or 13.3%, was credited to the fee; $25, of which $5, or 20%, was credited to the fee; $75, of which $7, or 9.3%, was credited to fee; and $50, of which $9, or 18%, was credited to the fee. In all Phillips paid in $215.00, $30 being applied to the fee. Phillips also went into bankruptcy.

In the Farnum case (R. 104) the total indebtedness was $2,200.00 and the total fee was fixed at $150. The Farnums made only one payment, amounting to $21.00. Of this amount $19.00 was paid to creditors, and $2, or 9.5%, was credited on the fee. Shortly after making this one payment, the Farnums were garnisheed and made no further payments to Credit Advisors.

In the Epperson case (R. 105) the debts totaled $500 and the fee was fixed at $50. The debtors paid in six payments of $20 each, or $120. Credit Advisors disbursed $50 to one creditor and $40 to another, retaining as their fee $30 or 25%.

The evidence does not show how many creditors were listed in the above cases, nor the amounts due to each, nor any payments to creditors except as above stated, but it may be doubted whether the distributions made by Credit Advisors in the above mentioned cases were made on a fair pro rata basis as it was represented would be done in Exhibit A (R. 20, 115) and B (R. 20, 116). So far as the record goes there is nothing to show that when solicited to co-operate with the plan the creditors were informed that so large a proportion of the payments made would be diverted to payment of the fees before they received anything on their claims. Nor does it appear that the debtors were informed that each payment made by them did not reduce their indebtedness by the full amount paid in by them, and that payments to creditors would be reduced by the amounts retained by Credit Advisors. Perhaps it is not strange that, as Mr. Skrupa testified (R. 106) only a very small percentage of his clients go all the way through with Credit Advisors plan.

The testimony of Mr. Skrupa supplies some evidence of unfairness in the distribution of the debtor's payments. This is indicated by the fact that in the Nickerson case above mentioned, only one creditor received anything, and that in the Epperson case only an attorney and an acceptance company were paid anything.

As an inducement to secure the co-operation of creditors in the plan, they were told, "You will receive so much a month until the debt is paid in as long as the man is paying us regularly." (R. 14, 15). But on the same page, in discussing distribution to creditors, the following appears:

> "Q. And then do you govern the amount of payment which you negotiate or attempt to negotiate with each individual creditor on that list by the type of claim it is and whatever, how consistent the particular credi-

tor is, and whatever you can to try to make his payments cover all the money?

A. We try to fit the bills within the man's income.

. . .

Q. And does it also depend upon the extent of pressure exerted for payment by that particular creditor?

A. We try to satisfy the creditor.

Q. So the answer would be 'Yes, it does', would it not, sir?

A. Yes, sir."

Again, in disbursing the money paid to it by the debtor, a listed creditor who refuses to co-operate with the plan is ignored in the distribution. Credit Advisors does not tender this share to such creditor for credit on the debt, nor is this sum set aside and held for such creditors' use. Instead, Credit Advisors distributes this share among the co-operating creditors (95), who by this means are accorded a preference over other known creditors.

But there is another phase of Credit Advisors' dealings which must be considered. Neither Mr. Skrupa nor any of his employees is an attorney (R. 13, 82). They profess to be interested only in the debt problems of their clients, and not in their legal problems (R. 82), and, so they say, are not engaged in giving any opinions of a legal nature (R. 13). But "debt", "debtor" and "creditor" are legal terms, signifying legal relationships, and clothing the parties with legal rights and duties. It is difficult to see how a debt adjuster can function without being involved in questions of law inherent in business problems.

In *Home Budget Service* v. *Boston Bar Association*, 139 N.E.2d 387, the Supreme Judicial Court of Massachusetts upheld the constitutionality of a statute of that state which declared that debt-pooling was to be deemed the

practice of law and forbidding persons whe were not a member of the bar from engaging in such business. The court said (p. 390) that the conduct of plaintiffs presents features of the practice of law and viewed as a whole amounted substantially to that. One similarity mentioned was the relationsihp of trust and confidence between the client and the debt pooler, which is not unlike that between the client and his attorney. The Court said further:

> "That the debt pooler neither enters the courtroom nor prepares legal documents does not save its conduct from classification as the practice of law. Nor is there escape in the fact that it does not advise as to the validity of claims; for quite to the contrary its omission to do so may be a surrender to some demands which a member of the bar perhaps ought to question and advise the debtor to contest."

This last statement is pertinent in the present case. When we consider that the debt adjuster's appeal is largely to those inexperienced in business ways and unable to fend for themselves; when we consider the debt adjusters somewhat extravagant promises, peace of mind and relief from debt worries for the distress; and when we consider Mr. Scrupa's testimony that credit advisors never consult an attorney in regard to the debtor's indebtedness and that it simply "goes along" with the demands of attorneys representing creditors (R. 14); that it assumes the correctness of fixed finance payments (R. 16), it never discusses wage earner's plans or bankruptcy (R. 21), and never considers whether the debt may be usurious (R. 30); it is clear that Credit Advisors falls short of giving its clients the help they have been led to believe they will get from the services of the debt adjuster.

In view of the restrictive statutes enacted by so many states; in view of what was said in *Home Budget Service* v.

Boston Bar Assn., 139 N.E.2d 387; in view of the numerous published articles charging debt adjusters with improper conduct; and in view of Credit Advisors' broad promises and faulty performance as disclosed by the evidence in this case, we feel constrained to say that the majority opinion in the court below erred in pronouncing debt adjusting to be a legitimate business. And in view of all the circumstances, we contend that the Kansas legislature had ample grounds for concluding that the public welfare required that the business of debt adjustment should be made subject to restrictive legislation.

But there is a further test which a statute, whose constitutionality is assailed, must pass. Not only must the evil sought to be remedied bear a reasonable relation to the public welfare, but the remedy provided must be reasonably adapted to accomplish the end sought.

The trial court held as a matter of law that the act in question was prohibitory and not regulatory; but even if construed as regulatory, that it is an unreasonable and unwarranted regulation of a lawful business and therefore in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution (R. 128).

Assuming for the moment that the Kansas statute is prohibitive of a lawful business, we do not think that the broad rule can be laid down that the constifution forbids any prohibition of a lawful business.

> "The constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large or upon any substantial group of the public." (*Nebbia* v. *New York*, 291 U.S. 502, 539, 78 L. Ed. 940, 958).
>
> "It is enough that there is an evil at hand for correction and that it might be thought that the partic-

ular legislative measure was a rational way to correct it." (*Williamson* v. *Lee Optical*, 348 U.S. 483, 488, 99 L. Ed. 563, 572, 75 S. Ct. 461).

"With the wisdom of the exercise of that judgment the court has no concern, and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended." (*Purity Extract & T. Co.* v. *Lynch*, 226 U.S. 192, 201, 57 L. Ed. 184, 187).

Hence, when the legislature has reason to believe that the public welfare requires it, even a legitimate occupation may be restricted or prohibited in the public interest (*Breard* v. *Alexandria*, 341 U.S. 622, 632-3, 95 L. Ed. 1233, 1243). Accordingly, it has been held that an innocent activity may be regulated or prohibited if its purpose frequently offers opportunity for fraud or deception (*McCanless* v. *State*, (Tenn.) 181 S.W.2d 154, 153 A.L.R. 832).

However we contend that the Kansas statute is not prohibitory, but is, in fact, regulatory. To prohibit means to forbid, to suppress, to prevent or stop altogether. It signifies an end to something, whereas to regulate implies continued existence in some restricted or limited manner. In the first place the statute in question does not apply to all debt adjustment, but only to such service as is performed for a consideration. This is not a mere academic gesture, for Mr. Skrupa testified (R. 76) that a debt adjustment service is operated at Phoenix, Arizona, by a group of creditors for the benefit of themselves and those indebted to them. It was also his understanding that a like service is performed in some places by an agency of the Community Chest.

In addition, the statute expressly states that it is not applicable to debt adjusting when incurred incidentally in

the practice of law. We think the legislature could properly make this exception. The evidence in this case shows that the debt adjuster advertises his services, but the lawyer cannot. It shows that the adjuster cannot give the service which the client thinks he will get if the adjuster ignores the legal aspects of the debtor's problem, whereas the lawyer is fitted by his training to give the debtor the kind of service he really needs. And the adjuster is not governed by canons of legal ethics whose violation may render the attorney liable to disbarment. The result is that debt adjustment is not entirely banned in Kansas, but is regulated to the extent that it may still be done by those who are not actuated by the profit motive, and by those whose professional skill fits them for such service, and who are subject to the restraints imposed by professional ethics. Recognizing in debt adjusting an occupation which it deemed harmful to the public, the legislature chose a remedy which it deemed would supply a needed protection to the public. And, even if the statute in question was not the best solution of the problem which might have been provided, it is one which is reasonably adapted to provide the protection which the legislature sought to give the public. The statute therefore does not violate any right guaranteed by the Fourteenth Amendment.

II. The Title of the Kansas Statute Complies with Constitutional Requirements.

In the court below, appellee Skrupa contended that the Kansas debt adjusters statute was insufficient to meet the requirements imposed by Art. II, Section 16 of the Kansas Constitution, and that because thereof, said statute is invalid. In deciding this case, the court below made no comment on this contention. The question is, of course, one of state law, and will be considered briefly.

The constitutional provision referred to above (Art. II, Sec. 16) is as follows:

> "Sec. 16. Subject and title of bills: Amendment of laws: No bill shall contain more than one subject which shall be clearly expressed in its title, and no law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed."

This constitutional provision was discussed in *In re Division of Howard County*, 15 Kan. 194, 214:

> "The 'subject' to be contained in a bill under §16, art. 2, of the constitution, which provides that 'No bill shall contain more than one subject, which shall be clearly expressed in its title', may be as broad and comprehensive as the legislature may choose to make it. It may include innumerable minor subjects, provided all these minor subjects are capable of being so combined as to form only one grand and comprehensive subject; and if the title to the bill, containing this grand and comprehensive subject, is also comprehensive enough to include all these minor subjects as one subject, the bill, and all parts thereof, will be valid."

The Supreme Court of Kansas has consistently adhered to the rule as above stated. In *State ex rel.* v. *McCombs*, 129 Kan. 834, 284 Pac. 618 (1930), the court said (P. 837):

> "Without anticipating a decision as to the validity of some challenged details of the statute, it should be stated—as this court has often done heretofore—that the constitutional inhibition against the incorporation of more than one subject in a single act of the legislature is never to be construed in a narrow or technical sense, but rather the contrary. Whatever details are germane to the principal subject matter of

a statute or incidental thereto may properly be incorporated. . . ."

"Some practical rules for testing the sufficiency of titles to legislative enactments may be deduced from the many cases cited by counsel, to this effect: The more general the language of the title the broader the subject matter of the act may be with due deference to the constitutional requirement of section 16 of article 2 (*Division of Howard Co.*, 15 Kan. 194; *State* v. *Barrett*, 27 Kan. 213; *State* v. *Scott*, 109 Kan. 166, 197 Pac. 1089). The more restrictive the title the more the matter which may properly be included within the body of the act is likewise restricted. (*State, ex rel.* v. *Bankers, etc., Ass'n*, 23 Kan. 499). The title may be broader than the act itself, but the act may not be broader than the title. (*Ash* v. *Thorp*, 65 Kan. 60, 68 Pac. 1067; *State, ex rel.* v. *Reno County*, 98 Kan. 648, 650, 158 Pac. 861.)" (p. 838).

Even more recently, these principles have been reaffirmed in *State ex rel.* v. *Board of Education*, 173 Kan. 780 784-5, 252 P.2d 859 (1953); *State ex rel.* v. *Kansas Turnpike Authority*, 176 Kan. 683, 697, 273 P.2d 198; *Water Dist. No. 1* v. *Robb*, 182 Kan. 1, 9, 318 P.2d 387 (1957); *State ex rel.* v. *Wichita*, 184 Kan. 196, 198, 335 P.2d 786 (1959).

The principles above stated have been applied in the United States Supreme Court, when considering state statutes attacked on the ground of failure to comply with constitutional provisions similar to Art. II, Sec. 16 of the Kansas Constitution. See *Posados* v. *Warner, Barnes & Co.*, 279 U.S. 340, 73 L. Ed. 729, 732, 49 S. Ct. 333; *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165, 187, 76 L. Ed. 1038, 1050, 52 S. Ct. 548; *Montclair* v. *Ramsdell*, 17 Otto 147, 155, 27 L. Ed. 431, 434; *Detroit* v. *Detroit Citizens Street Railway Co.*, 184 U.S. 368, 46 L. Ed. 592, 609; *Blair* v. *Chicago*, 201 U.S. 400, 452, 50 L. Ed. 801, 823, 26 S. Ct. 427.

The title of Senate Bill No. 366, now known as Laws of 1961, Ch. 190, is as follows:

> "AN ACT concerning the business of debt adjusting; making certain acts unlawful, and prescribing penalties therefor:"

We think this title sufficiently comprehensive to embrace all the provisions of the act, and that such provisions do not cover more than one subject. That subject is "the business of debt adjusting." While the title specifies also the creation of a misdemeanor and prescribes the penalty for violation, that misdemeanor is intimately related to and connected with the subject of "the business of debt adjusting." Aside from the title, and the effective date, the statute consists only of the definition of "the business of debt adjusting" and the proviso excepting such acts when "incurred incidentally with the lawful practice of law in this state." It cannot be doubted that the definition of "the business of debt adjusting" is germane to the subject of the act; and the exception permitting attorneys in the regular practice of their profession is likewise certainly within the scope of the title.

The scope of a title couched in broad general terms is illustrated by L. 1909, Ch. 182, now being found in G.S. 1949, Ch. 60. This is the present code of civil procedure, comprised of some 900 sections covering such diverse subjects as limitations, venue, parties, trials, appeals, divorce, etc. The title to this act was simply "AN ACT concerning the code of civil procedure." One section made some change in the procedure for appeals in divorce cases, and in *Miller* v. *Miller*, 113 Kan. 22, 213 Pac. 634, it was contended that the act was invalid because no reference was made to divorce in the title of the act. The Supreme Court of Kansas upheld the statute, saying:

> "Defendant also complains that the limitation of time in which to file a notice of intention to appeal is found under a subtitle, 'Divorce and Alimony' in the code of civil procedure, and that the title to the act is not sufficiently broad. There is no merit in defendant's contention. The words 'Divorce and Alimony' are not part of the title but constitute a subhead. The title to the act is, 'AN ACT concerning the code of civil procedure.' The rule has been announced in many cases that section 16 of article 2 of the constitution is not to be construed in any narrow or technical spirit. It must be applied in a fair and reasonable way. It is sufficient if the title fairly indicates, in general terms, its scope and purposes. Provisions of our code covering divorce and alimony are properly found in the 'ACT concerning the code of civil procedure.'"

Numerous similar cases can be found in the Kansas reports, but reference is made only to *City of Wichita* v. *Sedgwick County*, 110 Kan. 471, 204 Pac. 693, which involved certain sections of the Act of 1903 entitled "AN ACT relating to cities of the first class." The county contended that the title was insufficient to include sections requiring the county to reimburse the city for expenses in connection with epidemics of contagious diseases. The Court said that this contention was without merit, the act being obviously designed as a code covering the functions of government in cities of the first class, fixing their status and defining their powers and duties with respect to themselves and to their articulate relationship with the general scheme of government in this state and its various subdivisions, and these details need not be stated in the title.

It cannot be said that the penal provisions in the statute in question went beyond the scope of its title, as the title expressly mentions "making certain acts unlawful and prescribing penalties therefor." The sole question with

respect to this language of the title is whether it introduces a separate and further subject not included in the title of the act.

In *State* v. *Campbell*, 50 Kan. 433, 32 Pac. 35, it was contended that a section making it an offense to maintain a liquor nuisance was not included in the title. The Court said that "that part of the title which says, 'AN ACT relating to intoxicating liquors' is certainly enough to cover the provision in question."

One further example will suffice. Kansas has a statute entitled "AN ACT defining vagrancy and providing punishment therefor." The act defined four distinct acts as constituting vagrancy, and a defendant challenged the constitutionality of the statute. The Court said:

> "The petitioner first assails the title of the act, contending that it does not fairly cover the subject of the act and embraces more than a single subject. It is a broad and comprehensive title, relating to vagrancy, a single subject. Certain acts of commission and omission are denounced as vagrancy and the punishment for them is prescribed. Under the decisions that have been made these are so clearly within the scope of the title that a discussion is not justified." (Citing cases).
>
> *In re Clancy, Petitioner*, 112 Kan. 247, 210 Pac. 487.

On the basis of the foregoing, we contend that the statute in question (L. 1961, Ch. 190) does not violate the requirement that an act must not cover more than one subject, and that such subject must be clearly stated in its title. The statute is therefore not unconstitutional and invalid on that ground.

For the reasons above stated, we submit that the statute in question should be held valid, that the judgment of

the trial court should be overruled, and that the permanent injunction restraining appellees from enforcing said statute should be vacated.

Respectfully submitted,

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APPENDIX A.

Kansas Session Laws of 1961 (also referred to as Senate Bill No. 366. Section of 1961)

CHAPTER 190

CONCERNING THE BUSINESS OF DEBT ADUSTING; MAKING CERTAIN ACTS UNLAWFUL AND PRESCRIBING PENALTIES THEREFOR

Senate Bill No. 366

AN ACT concerning the business of debt adjusting; making certain acts unlawful and prescribing penalties therefor.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. For the purpose of this act, "debt adjusting" means the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon. Whoever engages in the business of debt adjusting shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment: *Provided*, That the provisions of this act shall not apply to those situations involving debt adjusting as herein defined incurred incidentally in the lawful practice of law in this state.

SEC. 2. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 13, 1961.

APPENDIX B.

State Statutes relating to Debt Adjustors:

1940 Minnesota St. Ann., 332.04-332.11 (1940)
1955 Maine, 1961 Supp., Ch. 137, Secs. 51-53 (1955)
1955 Massachusetts, Ann. Laws, C221, Sec. 46c (1955)
1955 Pennsylvania Stat. Ann., Title 18, Sec. 4897 (1955)
1956 Georgia, Code Ann., 84-3601, 3603 (1956)
1956 New York, McKinney's Consol. Laws Ann. Penal Law, Art. 39, Secs. 410, 412 (1956)
1956 Virginia, Code, 54-44.1 (1956)
1957 California Financial Code, 12200-12331
1957 Illinois Ann. Stat., c 16 1/2, 251-272
1957 Oklahoma Statutes Ann., Title 24, Secs. 15-18
1957 West Virginia, 1960 Supp., to Code Ann. 6112(4)
1957 Wyoming Statutes 33-190 to 33-192
1958 Ohio Revised Code Ann. 4710.01-4710.99
1959 Florida St. Ann. 559.10 to 559.13
1960 New Jersey St. Ann. 2 A: 99A 1 to 99A 4.
1961 Kansas, G.S. 1961 Supp., 21-2464 (SL 1961, Ch. 190)

APPENDIX C.

List of Published Articles:

Personal Finance Law Quarterly Report:

Vol. 10, No. 1, Winter, 1953, p. 3, 1955 "Pennsylvania Prohibits Debt Adjustment Companies."

Vol. 10, No. 2, Spring, 1956, p. 36. "New York Outlaws Debt Pooling."

Vol. 11, No. 2, Spring, 1957, p. 46.	"Massachusetts Upholds Anti-debt Pooling Statutes."
Vol. 16, No. 4, Fall, 1962, p. 116.	"Kansas City Better Business Bureau, 'Debtors Misled and Deceived by Proraters.'"

Unauthorized Practice News:

Vol. 13, No. 5, June, 1955	"Debt Adjustment—Meanest Racket Out."
Vol. 21, No. 4, Dec., 1955, pp. 64, 113.	
Vol. 21, No. 4, Dec., 1956, p. 29.	"Should Debt Adjusters Be Outlawed?"
Vol. 23, No. 3, Sept., 1957, p. 6.	Illinois Bar Counsel Report

The Legal Aid Brief Case (of National Legal Aid Assn.)

Vol. 13, No. 5, June, 1955, pp. 99, 105.	Reprint of "Debt Adjustment, Meanest Racket Out."
Readers Digest, Oct., 1955.	"Beware of Debt Adjustment Racketeers." (Condensed from "Debt Adjustment, Meanest Racket Out.")
Good Housekeeping, Feb., 1959.	"Warning, the debt adjusters are back."
A.F.L.-C.I.O., Executive Council, Feb. 21, 1961.	"Statement on Debt Adjustment Business."
A.F.L.-C.I.O., Federationist, Sept., 1961.	"The debt pool sharks."